No. 84-1044

In The

Supreme Court of the United States

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
a California corporation,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE, AMICUS CURIAE, IN SUPPORT OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

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INTEREST OF THE AMICUS CURIAE

The California Chamber of Commerce ("The Chamber") submits this brief in support of Appellant Pacific Gas and Electric Company ("PGandE"). All parties have consented.

The Chamber is a voluntary, nonprofit, California-wide business association, with more than 4,800 members

from virtually every industry and geographic section in the state. Ninety percent are small or medium-size businesses. The Chamber's membership also includes 150 trade associations, and it is affiliated with and regularly communicates on current business issues with 387 local and regional chambers of commerce and more than 167,000 small businesses. The Chamber estimates that its members and affiliated local chambers employ 75 percent of the private sector work force in California.

The Chamber (a) advises its members of state and federal legislative and judicial developments; (b) appears for its members before local, state and federal legislative bodies; (c) sponsors educational seminars and commissions publications to inform its members of their obligations under the law; and (d) initiates legal proceedings to protect the interests of its members.

The Chamber, on behalf of its members and affiliates, is vitally interested in the issues involved in this case. The decision of the California Public Utilities Commission ("the Commission") poses a threat to fundamental rights of property and expression. Accordingly, The Chamber respectfully urges the Court to reverse the judgment of the California Supreme Court upholding the unconstitutional order of the Commission, and to vacate the Commission's decision.

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SUMMARY OF ARGUMENT

Each month for sixty years, PGandE has used the space in its billing envelopes to express its views to its customers. The Commission has now held that PGandE's

ratepayers have a property interest in "extra space" in PGandE's billing envelopes, and has ordered PGandE to insert messages of its adversary in the envelopes to be sent to PGandE's customers. Thus, under the guise of redefining established property rights, the Commission has attempted to promote certain speech, discourage other speech, and avoid strict scrutiny of its actions. This violates PGandE's first amendment rights. *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530 (1980); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557 (1980).

The Commission's approach is an impermissible attempt to make an end run around the first amendment. Even if its approach were valid, the Commission's particular property-definition decision violates settled principles of law and has no basis in fact. *Board of Pub. Util. Comm'rs v. New York Tel. Co.,* 271 U.S. 23 (1926).

The restriction on PGandE's speech cannot be justified as a narrowly tailored means of serving a compelling state interest. First, the state interest the Commission identifies—increasing consumer participation in Commission proceedings—is simply not compelling. Second, the means chosen to serve that interest are only indirectly related to it, and there are superior alternatives that the Commission did not consider.

The Commission's decision is not a reasonable time, place or manner restriction either. The decision does not restrict PGandE's speech because its time, place or manner is disorderly or invades the rights of others. Rather, the decision restricts PGandE's speech so that it can be replaced in the *same* time, place and manner by the speech of others who will express different opinions. That is

content regulation, not time, place or manner regulation, and it violates the first amendment.

Finally, the Commission's decision forces PGandE to publish the opinions of its adversary with which it disagrees. This is a plain violation of PGandE's right not to speak. *Wooley v. Maynard,* 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974).

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ARGUMENT

The Commission has decided that although PGandE owns the envelopes in which it sends its bills, because of an accident of postal service rates, the ratepayers have a quasi-property interest in the extra space in the billing envelope, and that therefore the Commission can dictate who may speak in that space and when. In essence, the Commission seeks to promote speech by people whose views are opposed to PGandE's and to evade first amendment scrutiny by redefining what has always been (and still is) PGandE property:

> Since the [extra billing envelope] space is not the property of PGandE in the first place, it has no right to use the space for First Amendment purposes.

(Dec. 83-12-047, Appendix to Jurisdictional Statement of Appellant Pacific Gas and Electric Company ("App.") p. A-22) The Commission's decision is an abuse of its power that offends basic first amendment principles and threatens the free speech rights of all citizens. Both the Commission's approach and its particular decision are unsound.

I. The Commission's Decision that Ratepayers Own the Space in PGandE's Billing Envelope Is Incorrect, Unsound and Unwise.

A. A State Should Not Be Permitted to Redefine Property Rights for the Purpose of Abridging the Right of Free Speech.

PGandE has mailed its monthly newsletter, *Progress,* to ratepayers in the "extra space"[1] of its billing envelopes for sixty years. The Commission never questioned PGandE's ownership of that space or its exclusive right to use it. Suddenly, in response to a request for access to that space by PGandE's adversary, TURN,[2] the Commission has decided that PGandE does not "own" the extra space after all, and that TURN must be allowed to use it to communicate its own messages to PGandE's customers.

Notably, the Commission declines to hold that the billing envelope is itself ratepayer property. (Dec. 83-12-047, App. pp. A-2 - A-3) Yet the Commission holds that because postage is considered in setting utility rates, the "extra space"—variously described as an "artifact" (*Id.*) and an "accident" (Dec. 84-05-039, App. p. A-55 (Calvo, dissenting)) — has value that should not be used by PGandE, but should benefit the ratepayers. From this, the Commission concludes that "the extra space in the billing envelope 'is properly considered as ratepayer property.'" (Dec. 83-12-047, App. p. A-3 (quoting Dec. 93887, App. p. A-72)) The Commission, however, is vague in defining

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[1] The Commission defines "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." (Dec. 83-12-047, App. p. A-3)

[2] TURN is the acronym for Toward Utility Rate Normalization, the real party in interest.

the precise nature of the ratepayers' interest and right to control that space:

> We have stated that the extra space belongs to the ratepayers. In so doing, we are not so much describing a traditional property right as an equity right.

(Dec. 83-12-047, App. p. A-4 (quoting Dec. 83-04-020, App. p. A-100))

Although the nature and extent of the ratepayers' purported property interest is unclear, the Commission's purpose in creating it is evident:

> Our goal . . . is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E.

(Dec. No. 83-12-047, App. p. A-17). Moreover, the Commission's "unjust enrichment" theory of property definition demonstrates that the Commission is as concerned that PGandE *not* benefit from any extra space as it is that the ratepayers do benefit from it. (Dec. 93887, App. pp. A-67 - A-69; Dec. 83-12-047, App. p. A-3; Dec. 84-05-039, App. p. A-52)[3]

Thus, the Commission transforms an accident of postal rates into a nebulous property interest for the purpose of promoting the particular messages of TURN or others whose message the Commission considers "meritorious." (Dec. 83-12-047, App. at A-19) This is clearly a content-based regulation of speech, and it violates the first amendment.

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[3] What the Commission really seems to be saying is that *it* owns the extra space.

Although for due process purposes, property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law," *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972), this Court has never held that a state may redefine property rights as a means to enjoin or promote particular speech. The Commission cites no authority for its novel attempt to avoid first amendment concerns by redefining property interests. As noted by one of the Commissioners, dissenting from the decision, "there is absolutely no precedent for, or constitutional basis of [sic] a dilution and transfer of a person's property right in order to justify a restriction upon that person's right of free speech." (Dec. 83-12-047, App. p. A-58 (Bagley, dissenting))

The only conceivable support for the Commission's decision is *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), and it does not authorize a redefinition of property rights as a means of promoting or discouraging certain speech. In *PruneYard,* the Court upheld the decision of the California Supreme Court that the California Constitution protects speech and petitioning reasonably exercised in privately owned shopping centers. The Court did not hold, however, that a state may grant a property interest in shopping centers to patrons, thereby conveying a right to speak and curtailing the speech rights of the true owner. Rather, the Court held that where a property owner invites the use of the property by the public, the state may, on a content-neutral basis, protect the rights of the public to speak there. 447 U.S. at 87.

This case is the converse of *PruneYard.* PGandE has never allowed the public to use the extra space in its

envelopes; for sixty years it has used that space itself, exclusively. Thus, it is the state, not PGandE, that has invited the public to use PGandE's property. Moreover, in doing so, the state does not merely seek to protect the rights of all to speak in a place voluntarily opened to them by the owner; it seeks to promote the speech of a particular group with a particular message. *PruneYard* is thus inapposite.

The Commission's approach is profoundly troubling. If upheld, states may, by an oblique relabeling process, circumvent the strict scrutiny given to governmental intrusions on the right of free speech. The right of free speech would vary at the whim of the individual state, reducing the now-universal constitutional right to a nullity. The Court should not sanction such a radical departure from fundamental constitutional principles, especially where, as here, the basis for the redefinition of property interests is legally and factually unsupported, and the nature of the interest is not even defined.

B. There Is No Legal or Factual Support for the Commission's Redefinition of Property Rights.

1. The Commission's Decision Has No Legal Basis.

Many years ago this Court rejected the notion that ratepayers have a property interest in the property a utility acquires with revenues received from the ratepayers. The seminal case defining the relationship between a utility and its customers and the rights of shareholders and ratepayers in utility property is this Court's decision in *Board of Pub. Util. Comm'rs v. New York*

Tel. Co., 271 U.S. 23 (1926), in which the Court held that the ratepayers were not entitled to the benefit of an admittedly excessive depreciation reserve. The Court said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stock.

271 U.S. at 32. *See Pacific Tel. & Tel. Co. v. Public Util. Comm'n*, 34 Cal. 2d 822, 828-29 (1950) (devotion of property to public use does not vest title to the property in public). Indeed, in *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980), the Court specifically recognized that a utility's billing envelopes belong to it, rather than to the ratepayers. The Court held that the state Public Service Commission could not prevent the utility from utilizing *"its own billing envelopes* to promulgate its views on controversial issues of public policy." *Id.* (emphasis added).

The Commission's decision cannot be reconciled with these decisions or with their controlling principle. Indeed, the Commission's efforts to avoid the principle have produced a far-reaching decision with no coherent rationale and no discernible boundaries.

2. The Commission's Decision Has No Factual Basis.

The Commission proceeds from the premise that postage costs are factored into the utility rates set by the

Commission. (Dec. 83-12-074, App. p. A-3; Dec. 93887, App. p. A-67) From this the Commission concludes that any extra space in billing envelopes "belongs" to the ratepayers. As noted above, this analysis defies the law as set down by this Court half a century ago. It also defies logic and the facts.

First, if the Commission is truly interested in determining the ratepayers' interest (if any) in the empty space, shouldn't it examine the whole of PGandE's costs and revenues to determine whether PGandE's use of the extra space makes PGandE's overall rate of return no longer "just and reasonable?"[4] The Commission's decision never considers this question.

Second, if the Commission must fixate on a single item in the total picture, shouldn't it at least consider the *actual* mailing costs rather than those projected in an earlier rate-making proceeding? The Commission concedes that the ratepayers don't *actually* pay for the "extra" space because the true mailing costs exceed projections. (Dec. 83-12-047, App. pp. A-8 - A-9) Thus, apart from its other deficiencies, the Commission's decision is a theoretical construct resting on a premise that is contrary to fact.

Third, if the Commission is going to decide this matter by toting up whether the ratepayers get what they

[4] If this analysis uncovered any "unjust enrichment" the Commission could easily correct it by an adjustment of rates, which would not raise any constitutional problems. *Cf. Consolidated Edison,* 447 U.S. at 543 ("[T]here is no basis in the record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base. Mere speculation of harm does not constitute a compelling state interest").

pay for, shouldn't it also consider what they get but don't pay for? The Commission acknowledges that PGandE's *Progress* contains information of value to the ratepayers. (Dec. 93887, App. p. A-69) Although PGandE pays for *Progress,* the Commission merely alludes to this other side of the ledger, and it gives PGandE no credit for this value that the ratepayers receive free of charge. (*Id.*)

Fourth, if inclusion of mailing costs in rates makes the extra envelope space belong to the ratepayers (in some sense), why doesn't everything else paid for by the ratepayers also belong to them (in some sense)?[5] If the notion is that "extra" space is different because it represents a value the ratepayers paid for but didn't receive, then why isn't all utility property with some "extra" economic potential treated the same way? Virtually all physical property has "extra" potential economic value, at least as advertising space. Are ratepayers entitled to use it that way? As Commissioner Bagley noted:

> Regardless of source, what are "the consequences beyond the circumstances presented in this case"? The face of every utility-owned dam, the side of every building, the surface of every gas holder rising above our cities, and the bumpers of every utility vehicle—to name just a few relevant examples—have "excess space" and "economic advertising value". Some utility corporations place bumper-strip messages on their vehicles. Buses and trucks regularly carry adver-

[5] Indeed, the arbitrary and piecemeal nature of the Commission's approach is evident in its own analysis. Although the Commission finds that both postage costs *and* envelopes are included in utility rates (Dec. 93887, App. at A-67), the Commission concludes that the ratepayers own the extra space in the envelopes, but not the envelopes themselves. (Dec. 83-12-047, App. p. A-3) The Commission does not explain this disparity.

> tising messages. In the words of the majority at page 23 of the decision, "It is reasonable to assume that the ratepayers will benefit from exposure to a variety of views . . ." Is it the postulate of this Commission, flowing from the decision's stated premise, that any three Commissioners at any time might decide that ratepayers would benefit from exposure to some particular socially desirable message from some ratepayer group making use of any or all such areas of excess valuable space?

(Dec. 83-12-047, App. p. A-40 (Bagley, dissenting)) Moreover, why do the ratepayers' property interests entitle ratepayers only to use extra space to speak? Shouldn't ratepayers, as "owners" of the "extra" capacity of utility property, be entitled to use the after hours "extra" capacity of utility offices, equipment and vehicles?

Fifth, the Commission's order in effect conditions PGandE's right to speak on arbitrary factors—the weight of paper used in bills and inserts, the postage-rate structure and the volume of legal notices that may be required in any given mailing. Where "extra space" is determined based on these arbitrary factors, it is irrational to premise first amendment rights on the ownership of that space. *See* Dec. 84-05-039, App. p. A-55 (Calvo, dissenting) ("The 'extra' space in the PG&E billing envelope is really not 'property' but is something of an accident").[6]

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[6] The injustice of the Commission's property-definition decision is compounded by the terms of its order. TURN is guaranteed access to extra space four times per year. (Dec. 83-12-047, App. pp. A-17 - A-18) PGandE can use the remaining space, if there is any, but has no comparable guarantee of access. Moreover, by granting PGandE access to space TURN chooses not to use, the Commission permits TURN to regulate PGandE's speech. As the dissent points out:

(Continued on following page)

If first amendment rights turn on the state's definition of property interests, that property definition must be based upon facts and reasoned analysis. The Commission's decision here defies reason and ignores the facts; it should not be the basis for abridging first amendment freedoms.

C. The Commission's Decision Has No Limit.

The Commission does not explain the source of its purported authority to redefine the property interests in PGandE's extra envelope space and does not place any limit on the authority of the state to redefine property rights. Accordingly, if upheld as a basis for denying first amendment rights, the Commission's decision has potentially infinite application. The result could be disasterous for small businesses and perhaps even individuals.

Even assuming that the state's regulatory authority over public utilities affords a basis for the Commission's decision, that authority does not limit the scope of its ruling. The State of California extensively regulates many industries, professions, banks and corporations. *See, e.g.*, Cal. Food & Agric. Code § 1 *et seq.* (Deering 1983)

(Continued from previous page)

> And now under the revised order TURN can determine, solely by its choice of paper weight, whether or not and if so how much material will be inserted in the envelope by defendant's management on behalf of shareholders. Under this order we have the unseemly situation where government, by its order and without specifying any criteria whatsoever, allows one party to proscribe the free speech of the other. That, compared to government proscription, is deprivation squared.

(Dec. 84-05-039, App. A-59—A-60 (Bagley, dissenting))

(regulating agriculture industry); Cal. Bus. & Prof. Code § 5000 *et seq.* (Deering 1976) (regulating 24 different professions); Cal. Fin. Code § 215 *et seq.* (Deering 1978) (regulating banks); Cal. Fin. Code § 18000 *et seq.* (Deering 1978) (regulating industrial loan companies); Cal. Bus. & Prof. Code § 16603 (Deering 1985 Supp.) (regulating sale of horror comic books). If the state can use that regulatory power to redefine the property rights of a utility, what will stop it from using it to do the same thing to the others it regulates?[7]

For example, a state might wish to regulate meat storage and packaging in butcher shops to protect the public from the dangers of meat contamination or spoilage. *See, e.g.,* Cal. Food & Agric. Code § 18691 (Deering 1985 Supp.) ("It is essential in the public interest that the health and welfare of the consumers be protected by assuring that meat . . . distributed to them [is] wholesome, not adulterated, and properly marked, labeled, and packaged"). Imagine a local butcher shop, subject to the state's regulation, which has a practice of inserting into the paper bags of its customers a leaflet promoting the health virtues of beef. The state, in its zeal to give consumers "exposure to a variety of views" on health issues, might redefine the paper bag as customer property (after all, the customer pays for it the same way ratepayers pay for billing envelopes), thereby giving vegetarian or health-related groups access to meat-consumers they might not otherwise reach.

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[7] Nor is the Commission's decision limited by the fact that utilities are monopoly businesses that recover their costs from ratepayers. As this Court has noted in the advertising context, both ordinary businesses and public utilities pass their expenses on to consumers. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 568 n.11 (1980).

Justice Powell has suggested other examples:

> A minority-owned business confronted with distributers from the American Nazi Party or the Ku Klux Klan, a church-operated enterprise asked to host demonstrations in favor of abortion, or a union compelled to supply a forum to right-to-work advocates could be placed in an intolerable position if state law requires it to make its private property available to anyone who wishes to speak.

PruneYard, 447 U.S. at 99 (Powell, concurring). If the conclusory "reasoning" of the Commission is sufficient to redefine property rights and circumvent the first amendment in this case, zealous agencies could easily conceive of plausible redefinitions of other property rights that might produce these intolerable results.[8]

II. The Commission's Decision Is an Unconstitutional Interference with PGandE's First Amendment Rights.

The Commission's decision restricts PGandE's right to mail its monthly newsletter, *Progress,* to its customers, a channel of communication PGandE has used each month for 60 years. In addition, the decision forces PGandE to send to its customers messages prepared by its adversary. On its face, this order violates PGandE's first amendment rights.

The Commission rejected PGandE's first amendment arguments largely by reasoning that "since that

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[8] TURN itself might be forced to provide a forum for PG&E. The state, as part of its regulation of non-profit consumer organizations, might redefine the empty space in the envelopes of organizations such as TURN as the property of all contributors. The state might then require TURN to include the statements of PG&E if ever PG&E chose to contribute to TURN.

[extra billing envelope] space is not the property of PGandE in the first place, it has no right to use the space for First Amendment purposes." (Dec. 83-12-047, App. p. A-22) Since the Commission's premise is incorrect, its reasoning is unsound and the first amendment violation is clear. None of the Commission's other justifications for its action has any merit either.

A. The Decision Violates PGandE's Right to Free Speech.

1. The Order Is Not a Narrowly Tailored Means of Serving a Compelling State Interest.

This Court's decision in *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530 (1980), is a square holding that a state may not constitutionally prevent a public utility from using its billing envelopes to communicate with its customers. This decision is dispositive, and sets the standard by which the Commission's order must be judged:

> Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.

447 U.S. at 540. The Commission fails to establish either a "compelling state interest" or a "precisely drawn means."

The alleged state interest here "is the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." (Dec. 83-12-047, App. p. A-22 (*quoting* Dec. 83-04-020, App. p. A-103)) The Commission

does not explain *why* that is a *compelling* interest, and it is not. Commendable as the Commission's goal sounds, it does not rise to the level of a "compelling state interest" that can override free speech. In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Court found the state interest in balancing political power to be insufficient to justify restrictions on campaign expenditures, and said:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .

424 U.S. at 48-49. That is directly applicable here. The Commission offers no answer to it.

Nor is the Commission's means of achieving its goal carefully tailored. Although the Commission asserts that a "shared approach to use of the extra space" (Dec. 83-12-047, App. p. A-22) constitutes a sufficiently narrow regulation, that is simply a conclusion with no supporting analysis. In fact, there are many obvious alternative means of increasing consumer participation in regulatory proceedings that do not entail any restrictions on utility speech, none of which was considered in the Commission's decision.[9] How, then, can its restriction be said to be precisely drawn?

2. The Order Is Not a Reasonable Time, Place or Manner Restriction.

Consolidated Edison embraced an alternative test that the Commission claims justifies its restriction on PGandE's speech. The Court "has recognized the validity of reasonable time, place, or manner regulations that

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[9] *See, e.g.,* Brief of Appellant Pacific Gas and Electric at Section IIC.

serve a significant governmental interest and leave ample alternative channels for communication." *Consolidated Edison,* 447 U.S. at 535. However, a "constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of the speech." 447 U.S. at 536. As the Court said:

> [T]he essence of time, place, or manner regulation lies in the recognition that various *methods* of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving sound truck that blares at 2 a.m. disturbs neighborhood tranquility.

Id. (emphasis added).

Thus, time, place or manner restrictions on the *method* of speech have been permitted in a few well-defined circumstances where that was necessary to protect against "substantial disorder or invasion of the rights of others."[10] Here, however, the Commission does not restrict PGandE's speech because its time, place or manner is disorderly

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[10] *Tinker v. Des Moines Indep. Community School Dist.,* 393 U.S. 503, 513 (1969) (school may not punish students for wearing black protest armbands. *See also Grayned v. City of Rockford,* 408 U.S. 104, 118 (1972) (antinoise regulation to maintain order of education facility constitutional); *United States v. O'Brien,* 391 U.S. 367, 377 (1968) (statute prohibiting destruction of draft card is constitutional); *Cox v. Louisiana,* 379 U.S. 536, 554 (1965) (licensing requirement for parades to regulate traffic constitutional). *Cf. Linmark Assoc., Inc. v. Willingboro,* 431 U.S. 85, 95 (1977) ("important governmental objective" to "promote integrated housing," but statute prohibiting "for sale" signs unconstitutional); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 766 (1976) ("strong interest" of state in maintaining "professionalism on part of licensed pharmacists," but prohibition on prescription drug price advertising unconstitutional); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 208-15 (1975) (protection of children, privacy, or flow of traffic insufficient interests to validate anti-obscenity ordinance).

or invades the rights of others. Rather, the decision restricts PGandE's speech so that it can be replaced by the speech of others in the *same* time, place and manner.[11] No case has held that the time, place or manner doctrine may be used offensively, as the Commission does here, to give another party a right it would not otherwise have.

Moreover, the Commission's order fails to satisfy the requirement that time, place, or manner regulations be "applicable to all speech irrespective of content." *Erznoznik v. City of Jacksonville,* 422 U.S. at 209. The Commission's claim that its decision "is neutral as to content of the parties' messages" (Dec. 83-12-047, App. p. A-21), ignores the realities of what it has done. It is insisting on the inclusion of consumer, as opposed to utility, viewpoints precisely because it anticipates the content will be different. (Dec. 83-12-047, App. p. A-17) Therefore, the Commission clearly is restricting "expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley,* 408 U.S. 92, 95 (1972). Like the New York Commission in *Consolidated Edison,* the Commission's "own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation." 447 U.S. at 537.

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[11] The fact that PGandE can pay extra to include *Progress* in the billing envelopes used by TURN does not cure the constitutional problem. The Commission cites no case that allows a state selectively to impose a fee for speech.

B. The Decision Violates PGandE's Right to Refrain from Speaking.

The Commission acknowledges that *Wooley v. Maynard,* 430 U.S. 705 (1977), and *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), stand "for the clear proposition that the First Amendment right to free speech also includes the right to refrain from speaking and the right not to be compelled by government to publish that which one does not wish to publish." (Dec. 83-12-047, App. p. A-23) The Commission's sole response is as follows:

> This argument, of course, again assumes that we are asking PGandE to publish the messages of TURN or others. In fact, as we explained above, we are simply ordering PGandE, which has physical control over the billing space, to make it available for the benefit of ratepayers. We are not asking PGandE to publish anything as its own.

(*Id.* (as modified by Dec. 84-05-039, App. p. A-51))

What the Commission means by this response is not clear. If the argument is that PGandE has no first amendment interest because it does not own the space in the envelopes, it is simply wrong. (pp. 5-13 above)

If the argument is that requiring PGandE to place TURN's materials in the PGandE envelopes and to mail them to customers does not force it to "publish" anything, it is contrary to any realistic and meaningful interpretation of the first amendment. The point of the first amendment in this application is that a person may not be forced actively to assist in the dissemination of

the opinions of others.[12] That is precisely what the Commission's decision does to PGandE, and it is precisely what *Miami Herald* and *Wooley* forbid. *See also* Dec. 84-05-039, App. pp. A-55 - A-56 (Calvo, dissenting).

Finally, if the Commission rests its response on the narrow point that PGandE is not required to publish TURN's opinions *as its own,* it again misses the point of *Miami Herald* and *Wooley.* The concern in those cases was not that anyone was being forced to pass off someone else's views as his or her own.[13] The concern in *Wooley* was with requiring a person "to participate in the dissemination of an ideological message" and to become "the courier for such message." 430 U.S. at 713, 717. Similarly, in *Miami Herald,* the concern was with compelling publication of material that editors and publishers do not wish to publish, thereby interfering with their editorial judgment as to the size and content of the publication. 418 U.S. at 258. Those same concerns are present here, but the Commission does not even mention them. Its decision is in direct conflict with the first amendment.

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[12] The Commission's decision is particularly offensive because, not only does it order PGandE to include TURN's statements in PGandE's billing envelopes, but it orders PGandE "to use *its* equipment to put the inserts of others into the billing envelope extra space." (Dec. 83-12-047, App. p. A-23 (emphasis added))

[13] In *Miami Herald* the statute required publication of replies to the publisher's own materials. No one would have thought the newspaper was the source of the replies. In *Wooley,* the message was to appear on every license plate in the state. Again, it would have been obvious that the message was not that of each car owner.

CONCLUSION

The Commission's action in this case strikes at the heart of fundamental property rights and first amendment values, and not only for the parties to this case. The decision is ill-conceived and unwise. This Court should reverse it.

Respectfully submitted,

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